

30 April 2015

Kevin Cantley  
General Manager  
SAFA Executive  
SA Finance Authority  
Department of Treasury and Finance  
By email

Dear Mr Cantley,

Consult Australia welcomes the opportunity to provide feedback on the South Australian Department of Treasury and Finance's *Guidelines for the Limitation of Liability of Suppliers, Consultants and Contractors*.

Consult Australia is the industry association representing consulting firms operating in the built and natural environment sector. These services include planning, design, engineering, architecture, technology, surveying, and project management solutions for individual consumers through to major companies in the private and public sector including local, state and federal governments.

We represent an industry comprising some 48,000 firms across Australia, ranging from sole practitioners through to some of Australia's top 500 firms with combined revenue exceeding \$42 billion a year.

As you would be aware, Consult Australia strongly supports the inclusion of contractual limits to liability as a measure to provide certainty to industry contracting with government, and one that also will save costs to public sector clients. Clearly "Unlimited Liability" does create uncontrolled risk to our member base, and in turn such risk has a significant associated cost which is an unnecessary impost on the consulting industry and ultimately flows on to the public sector client and the wider community. The broad coverage of this risk to our member base, often required to cover consequential loss amplifies this risk and cost equation.

Where contractual liability arises, consultants meet that liability through their professional indemnity and public liability insurance policies. By imposing unlimited liability on consultants, any liability that arises beyond the level of that insurance cover must therefore be met through that business's existing assets, which in many cases may be insufficient to do so. This clearly is an undesired consequence for the broader industry and wider community.

Accordingly, the imposition of unlimited liability typically leads to one of three responses by our industry, as found by Deloitte Access Economics' recent report into public sector procurement of consulting services<sup>1</sup>:

- 1) Firms take out a higher level of insurance cover to protect against possible loss. The additional premiums they face may rise by as much as 50%, and part of that cost is factored into their bid prices. In many cases, government clients are paying a higher price, when that additional level of cover was not needed and could have been addressed through a contractual limit to liability.

<sup>1</sup> Deloitte Access Economics (2015) *Economic Benefits of Better Procurement*. Available online at <http://www.consultaaustralia.com.au/docs/default-source/infrastructure/better-procurement/dae---consult-australia-final-report-050215---96-pages.pdf>

- 2) Firms may also decide not to bid for work, as the unlimited liability represents too great a risk for their business to bear. This in turn drives up prices through a lack of competitive pressure, as well as potentially depriving the client of contracting the best possible service provider.
- 3) Some firms may take a risk on bidding for a project even though they may in fact not have appropriate cover, or indeed the assets to cover such unlimited liability claims that may result. The client in this instance, if pursuing that particular consultant, may in fact not recover the liability costs and may possibly force that company into liquidation as a result. Neither of these outcomes are desirable for our industry.

Limiting liability based on a judgement and allocation of actual risk under a project provides business with certainty, in turn leading to reduced prices for clients and greater competition for work. Our previous paper, *Uncapped liability for consultants under Guidelines for the Limitation of Liability of Suppliers, Consultants and Contractors*<sup>2</sup>, also discussed how limiting liability also drives more successful project outcomes.

### **Opportunities for Improvement**

As well as supporting the inclusion of contractual limits to liability, there are a small number of specific areas in these Guidelines where Consult Australia submits there is scope for improvement. These are set out as follows:

#### Risk Assessment

Consult Australia is of the view that the Guidelines require a better definition of “low risk” contracting.

A concern of industry is the transparency of the risk assessment process within government. In Consult Australia’s experience, there is a bias amongst public sector clients towards considering projects as being of higher risk than they are. This has the obvious implication in relation to these Guidelines that many contracts would not come under the default cap, even where it is appropriate that they should. Already, we are aware that it is relatively common to require higher levels of insurance being held by consultants than is appropriate for the project in question. It follows that these projects require a higher level of insurance than is necessary, and that the additional cost is then passed on to the client.

Where a risk assessment is undertaken for a contract that considers a broad range of factors such as (for example) commercial, legal, technical, and environmental, then it is relatively easy to consider risk items where, should they not be treated, give rise to what one could consider “high risk”.

Industry would welcome a transparent approach to risk assessment processes. This includes the opportunity to review or provide input to the risk assessment process, to provide government with a balanced view of risk and the likelihood of risks being realised. This may provide some balance to the conversation of where risk settings land on any particular contract. Risk is not to be feared, but rather it should be quantified and managed. If the consultant has appropriate management systems in place and the employees of that firm are suitably qualified to manage the risk, then the “High Risk Item” potentially becomes a “Low Risk Item”. This should be taken into account when setting the liability profile and also assessing consultants’ capability and capacity to manage risk in conjunction with the public sector entity.

We furthermore submit that risk assessment for the purpose of assessing possible liability caps should solely include legal and commercial risks which reflect the costs of non-performance of the contract, and not other factors that are difficult to quantify in an initial risk assessment.

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<sup>2</sup> Memorandum of advice from Tony Horan, April 2013. A full copy of this advice is attached to this submission.

### Indemnities

Consult Australia is of the view that contractual indemnities are only appropriate where they cover loss caused by the consultant's direct error or omission. Where consultants are required to indemnify other parties for matters beyond their control, it is likely their professional indemnity insurance will not cover or respond to a claim.

Indemnities also carry the risk of undermining any liability cap, and drive higher prices or decisions from industry not to bid for work.

Accordingly, we believe the Department of Treasury and Finance should strongly consider removing indemnity clauses from those contracts where a limit of liability applies.

### Quantum of the Cap

While Consult Australia does not have a firm view as to what the quantum of a liability cap should be, it is important that public sector agencies are aware that higher caps will require higher levels of insurance, which in turn will attract more expensive premiums that may be passed on to clients, at least in part.

We note that in their submission in response to these Guidelines, the Office of the Industry Participation Advocate called for a reduction in the level of the cap to two times the contract value for Simple Procurements under the default cap, and removal of other capping frameworks other than the five times default cap to \$1 million.

This proposal would certainly assist industry by providing greater simplicity in understanding their requirements, as well as providing certainty. A lower and simpler cap of contractual liability would also reduce the need for higher levels of insurance cover and costly premiums.

### The Prescribed Heads of Liability

The Guidelines contain seven heads of liability to which the contractual limit on liability does not apply. While Consult Australia accepts that Heads 1, 5, 6 and 7 are appropriate and should be retained, we submit that the other heads should be reviewed for their further inclusion.

Head 4 (covering third party loss), in particular is problematic in that it is broadly drafted and may have so wide an application as to circumvent the Guidelines. Because third party loss can be quite remote to the parties to a contract, it also makes it harder for consultants to mitigate against loss of this type. Accordingly, Consult Australia is strongly of the view that this Head should be removed from the prescribed heads of liabilities that don't fall within the cap.

Heads 2 and 3, covering loss resulting from property damage or an infringement of intellectual property rights should also be considered for coverage within the capping framework, as these are the types of loss that professional indemnity insurance is designed to protect against.

### **Conclusion**

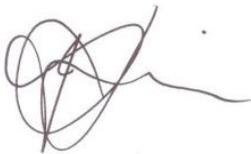
Consult Australia is grateful for the opportunity to provide feedback in response to these Guidelines. We strongly support the inclusion of contractual limits to liability in all public sector procurement, and the Guidelines offer an opportunity for the South Australian Government to realise cost savings and better project outcomes.

We do however believe that there is an opportunity for improvement with these Guidelines that will assist industry and deliver better and more cost effective outcomes for government. These improvements include:

- i) Strengthening the risk assessment process, to avoid all agencies determining that their projects are "high risk" by default;
- ii) Considering removing contractual indemnities where a liability cap applies;
- iii) Considering making the quantum of the cap simpler and where appropriate, lower; and
- iv) Revising the prescribed heads of liability to remove the current Head 4, and to also give consideration to removing Heads 2 and 3, so that these issues fall within the capping framework.

Consult Australia would welcome the opportunity to further discuss any issue raised within this submission, and to discuss how South Australian procurement can be generally improved. Should you wish to contact me, I can be reached at [jan@consultaustalia.com.au](mailto:jan@consultaustalia.com.au) or (08) 8213 2131.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Jan Irvine', with a long horizontal flourish extending to the right.

**Jan Irvine**  
State Manager, South Australia